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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 353

ALPHONSE LEWIS,
Petitioner,

vs.

CITY OF GRAND RAPIDS, MICHIGAN, et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent prays that a writ for certiorari to review the judgment of the Court of Appeals for the Sixth Circuit be denied.

CITATIONS TO OPINIONS BELOW

Reference is made to the Appendix to the petition for the opinion of the District Court (Appendix B pages 1c-84c) and reported at 222 Fed. Supp. 349. Reference is made to the Appendix to the petition for the opinion of the Court of Appeals (Appendix C pages 85c-123c) and reported at 356 F. 2nd 276.

Petitioner having represented that he has furnished 9 copies of the record the respondent will make use of the same record as filed with the court.

QUESTIONS PRESENTED

I. Was The Local Legislative Body Required To Provide Petitioner A Full Dress, Trial-Type Hearing On His Application For A Liquor License Transfer?

II. Are The Provisions Of The Michigan Administrative Code And The Michigan Administrative Procedures Act Applicable To A Local Legislative Body In Its Handling Of Liquor License Transfer Applications?

III. Were The Reasons For The Denial Of Petitioner's Application For A Liquor License Transfer Arbitrary, Capricious Or Unreasonable So As To Deny Petitioner Equal Protection?

IV. Was The Court Of Appeals Correct In Holding The Factual Findings Of Discrimination By The District Court To Be Clearly Erroneous?

STATEMENT OF THE CASE

The facts of this case are extremely well stated by Justice O'Sullivan in the opinion of the Court of Appeals (356 Fed. 2nd 276 on pages 278-284; and may likewise be found in Appendix C, pages 87c to 99c to the Petition).

Petitioner's "Statement of the Case" contains inaccuracies and omissions which compel this corrected statement.

ALPHONSE LEWIS: ATTORNEY

Petitioner, Alphonse Lewis, Jr., a licensed attorney, holding a political office of the State Public Administrator (41a, 70b) was contacted by one Patricia Barnett Ettress in the year 1959 (62b, 63b). Mrs. Ettress was having problems in securing the restoration of a liquor license to her which had previously been revoked or withdrawn by the Michigan Liquor Control Commission. It had previously been possessed by her stepfather (37a, 62b). Mr.

Lewis, attorney; Mr. Lewis, manager; Mr. Lewis, co-applicant for a liquor license, continued to represent Mrs. Ettress in a variety of capacities from that time (1959) until after he brought suit against her in the Circuit Court for Kent County in December, 1961 (292a-297a).

ALPHONSE LEWIS: MANAGER

Mrs. Ettress was considered to be totally unqualified to operate the bar and the issuance of the license was conditioned upon her obtaining a manager "to operate the establishment" (Ex. 8L, par. 5, p. 277a, 64b). Petitioner, Attorney Lewis then composed a management contract for Mrs. Ettress (his client) to execute which she did on May 20, 1959 (277a, 278a, 64b). Then Attorney Lewis became Manager Lewis for his "client" (100a, 64b). The "Agreement" provided that he (Lewis) would receive substantial percentages from the *gross* income of the bar (278a, 64b). Mr. Lewis continued to practice law throughout this period of time. He certainly was unable and/or unwilling to manage the bar (Ex. P-8L-12, p. 282a). As the licensee expressed it in her October 21, 1961, letter to the Liquor Control Commission, ". . . he wasn't what is referred to as a working manager because he is a attorney by profession law" (Ex. LL at p. 260a). Under the management agreement Attorney-Manager Lewis had full power "to hire and fire employees and had general supervision of all employees" (103a) of the bar.

GAMBLING

Prior to August 4, 1960, while Mr. Lewis was in full charge of all operations, a negro police sergeant, Dred Scott Madison, made a report of suspected gambling at the bar and building in which it was located (234a). The officer discussed the charges with Mr. Lewis (234a). Regrettably, the record does not reflect just how much involved Mr. Lewis was, in the gambling activities at the bar because the trial judge precluded all testimony from the licensee (Mrs. Ettress) on that subject (148a, 149a, 150a, 241a). Police Officer Sylvester Stephens (from the

Saginaw, Michigan Police Department) observed gambling taking place in the bar under the direction of Mr. Lewis' bartender, Dan Bethea (289a, 290a, 291a, 292a). Several arrests were made in a raid conducted by the Grand Rapids Police Department (Ex. 71, 288a-292a). As the result of delay and with the expert guidance of Mr. Lewis, who assumed his role of attorney, all persons were ultimately released except the one person in whom the licensee, Mrs. Ettress, had placed some measure of confidence (40a). Wesley Calloway plead "guilty" upon the advice of his attorney (bar manager) and was sentenced (248a, 249a). It is significant that a Hearing Officer for the Michigan Liquor Control Commission concluded after a "hearing" that "there is no doubt in my mind that there has been some gambling activities in your bar with the knowledge of the bartender" (102a). That Mr. Lewis, as an attorney *successfully* defended the criminal charges against those involved is conjectural. It is to be admitted that attorney Lewis was successful in avoiding prosecution of *himself* as manager.

ALPHONSE LEWIS: PURCHASER

In November, 1960, licensee Patricia was induced to sell the license to a friend of Attorney-Manager Lewis, one Dr. Cortez A. English, a negro dentist (253a). The sale was to be for $18,000 "cash" (251a, 252a). On May 15, 1961, Mr. Lewis (attorney and counsellor for his client Mrs. Ettress) amended the agreement to include himself as a co-purchaser with Dr. English (39a). *Subsequent* to her agreeing to allow her *attorney and counsellor* to purchase from her the one valuable financial asset she still possessed (without any independent counsel or attorney) Mrs. Ettress received an *invoice* for $16,596.15 from her attorney, manager, advisor (and now purchaser), which when combined with "advanced money" by Dr. English totaled $18,516.25 (246a). This shocking duplicity in one in whom she reposed such confidence did not escape Mrs. Ettress (282a) nor did it subsequently escape members of the Grand Rapids City Commission (157a, 169a, 200a).

Mr. Andrew Spyk, Jr., the investigator for the Liquor Control Commission processed the Lewis application with a notation that there was a "violation that was pending against the licensee" (42a). Throughout his 15½ years with the Liquor Control Commission Mr. Spyk observed that the Commission does not approve transfers until violations are cleared up (43a). The same is true of Mr. Arens (113a, 114a, 74b).

There is no statute or regulation requiring the approval of any police officer to effect a transfer in the State of Michigan (42a) and there are instances in which transfers are approved "over the objection of the Police or Sheriff Department (116a). There was no showing that the Police Superintendent was motivated by an attitude of prejudice or discrimination toward petitioner Lewis. In fact, witnesses called by Mr. Lewis at the trial, including Liquor Control Investigator Andrew Spyk and former Prosecuting Attorney Richard Loughrin observed no bias or discrimination by the Police Chief (44a). Likewise no bias or animus toward Mr. Lewis was exhibited by Lt. Sumski of the police force (45a). Mr. Arens of the Liquor Control Commission never observed any bias or animus toward Mr. Lewis (114a). Under the rules and regulations the transfer to petitioner Lewis and Dr. English could never have been effected without the birth certificate of Dr. English which had not even been furnished at the time of the trial of the case (114a).

TAXES

Under the "Management Agreement" prepared by attorney Lewis for his client to sign (which she did), he provided:

(a) That he, Lewis, would receive 10% of the gross profit, (par. II);

(b) That he would have general supervision of the business and "final authority and discretion in all matters relating to the operation of said business". (par. IV);

(c) That he (petitioner Lewis) "*agrees to pay all expenses, taxes and obligations incurred during the operation . . .*" (par. VII). (Ex. H.H. 256a, 257a).

Nevertheless, the taxes were not paid. The Internal Revenue Service placed a "stop order" on any sale or upon its reopening because taxes were due and unpaid (228a). The State sales taxes were not paid (228a). The City property taxes were not paid (45a, 46a). Ultimately the bond was cancelled for nonpayment of premiums (230a). Mr. Lewis, attorney and manager for Mrs. Ettress, purchased his client's "equity of redemption" in the bar equipment at an Internal Revenue Service auction sale held on November 13, 1961 (27a, 250a and Ex. No. 78, par. V, 294a).

LICENSEE REQUESTS RESCISSION

Upon several occasions Mrs. Ettress, client of attorney Lewis, requested rescinding of agreement to sell to Mr. Lewis. By the 10th day of May, 1961, Mrs. Ettress advised her manager:

> "In regard to your managing of the bar. I would like to terminate at the receipt of this letter . . . I do not feel that you are unable to take care of my affairs . . . because of *conflicting* interest. (Ex. RR. 263a).

On October 21, 1961, Mrs. Ettress requested the Michigan Liquor Control Commission to cancel out the proposed sale of the license" . . . because of some things that have happened since that application was first sent in originally . . . I had repeatedly asked him for a final accounting and he gave it to me this summer after I was all ready committed to sell it to him . . . I have never been in business before and that was why the Commission requested that I have a manager . . ." (Exhibit LL, 259a, 260a).

On December 19, 1961, Mrs. Ettress advised the Commission, "That the application of transfer of my license

to Mr. Lewis and Mr. English is hereby canceled . . ." (Ex. II, 257a, 258a).

On December 14, 1961, Mrs. Ettress went to the Grand Rapids Police Station and outlined the sordid history of the attempted transfer by and to her attorney-manager (Ex. GG, 252a 253a, 254a, 255a) under oath.

ATTORNEY VS. CLIENT (LEWIS VS. ETTRESS)

On the 21st day of December, 1961, Attorney-Manager Alphonse Lewis, petitioner herein, commenced legal action against his client, Patricia Ettress, in the Circuit Court for the County of Kent (Ex. 78, 293a-297a). In his prayer, Mr. Lewis demanded the license and that a receiver be appointed (Ex, 78; 296a). At the hearing held on the 26th of December, Mr. Lewis asked that *he* be appointed receiver (178a). For the first time during the period of over two years, Patricia Ettress had her own independent counsel (179a). The Judge questioned the ethics of Mr. Lewis and "indicated from the bench at that time that Mr. Lewis certainly could not expect to be receiver for a client . . . that he was suing" (179a).

The so-called "settlement of the Circuit Court" (1b) did not involve a Circuit Judge at all (20a). It was never approved by a Circuit Judge (81c) but was witnessed by a young attorney (81c) whose fees for the representation of Mrs. Ettress were to be paid for by Mr. Lewis (79c).

Mr. Lewis, while under oath in the Bankrupcy Court, testified that his settlement made him a receiver (18a), the very thing that the Circuit Judge designed as unethical and refused to approve. Later, when this was exposed he testified that "A. We did not end up doing it exactly that way . . . No, I was a Trustee then, not appointed a receiver" (18a, 19a).

The bankruptcy referee observed in his opinion after hearing all of the evidence: ". . . Mr. Lewis was not operating the bar as a court appointed receiver or trustee . . ." (20a).

HEARINGS BY THE CITY COMMISSION

The Grand Rapids City Commission works with the Committee System (59a). The commission to which Liquor License matters are referred is called the Safety Committee.

On January 11, 1962, petitioner Lewis, with his suit against his client in check by an alert and able judge (179a, 180a), demanded a hearing before the Safety Committee (60a). Five days later, on January 16, 1962, the next regular meeting after his demand he was accorded his first hearing, which he attended (60a, 154a). No one gave any indication of prejudice or animus or discriminatory behavior (68a, 129a, 154a), and Mr. Lewis was allowed to and he did make statements with reference to his application (60a, 90a). The matter of Mr. Lewis' action against his client was discussed (154a) and the application was tabled in order to enable the attorney-member of the Committee to examine the Circuit Court file (155a, 293a, 294a, 295a). The investigation by Commissioner Sevensma convinced him that "my suspicion as to the correctness and the ethics of this matter . . . seemed to me that he, that is, Mr. Lewis, stood in an untenable position (157a).

During March meetings of the Safety Committee, attorney-applicant-manager and plaintiff Lewis produced "settlement documents" (74a). In the meantime Attorney-Commissioner Sevensma consulted with Circuit Judge Hoffius who had the case assigned to him (170a). In March the meetings which Mr. Lewis attended related to discussions concerning unpaid taxes on the Bar which were the responsibility of Mr. Lewis, the Manager (45a, 76a, 90a). Tax delinquencies of all bars in the City was discussed, including that of the bar of which Mr. Lewis was the manager. (92a). Mr. Lewis admitted that he had the *power* to pay taxes (102a). At the time of the trial of this case the taxes chargeable to Mr. Lewis were still unpaid (45a, 46a). The payment of taxes was the subject of about every meeting (76a). The Committee was concerned with the demonstration of poor citizenship and concern for obligations on the part of the Attorney-Manager-Applicant (76a).

At the July 24th, 1962, meeting the recommendation of Superintendent of Police William Johnson was requested and he recommended against transfer to Mr. Lewis, citing as reasons Lewis' failure to pay taxes and his variety of relationships in the bar (187a, 229a).

Dr. VandenBerg was shocked and astonished with the position of Lewis in relation to Mrs. Ettress and concluded that "the person who is managing that Bar is incompetent or dishonest, or he is more interested in himself than his client" (200a). Dr. VandenBerg's concern was clearly expressed to and in the presence of Mr. Lewis and Dr. English (applicants and Patricia Ettress (239a). Mr. Lewis was given an unusual amount of time to explain his position (60a).

On July 31, 1962, the Safety Committee met and considered the application (194a, 195a). It had heard the Lewis story over and over again (22a). It had heard the views of Dr. English (346b). It had heard the views of Chief Johnson in the presence of Mr. Lewis and Dr. English (239a). Members of the Commission had expressed themselves to Mr. Lewis (240a). The decision to recommend to the Commission against the transfer was not arrived at in the presence of Mr. Lewis (194a-197a). The Committee presented its recommendations to the full Commission giving its reasons therefor (95a, 96a, 141a, 159a, 199a). The full Commission had the benefit of reports previously made as well (129a, 130a). Mr. Barto, the chairman made the report giving reasons (131a, 132a, 159a, 160a, 199a).

The Grand Rapids City Commission unanimously adopted a resolution denying the transfer (70a, 95a, 199a).

Mr. Lewis, who had sued his client, had no further interest in the transfer of the license (269a). Mr. Lewis sought to be heard repeatedly thereafter, demanding hearings of a trial type (121b, 122b). Mr. Lewis' right to be heard had ceased but he insisted upon appearing at subsequent meetings (156b).

The Court of Appeals concluded that there was no appeal relating to revocation. As stated by Judge O'Sullivan,

> "5. We do not reach the question of whether Lewis or the trustee in bankruptcy were denied due

process or equal protection of the law by the revocation of the license for Barnett's Bar. The appeal does not present such question." (356 *F. 2nd* 276, at p. 296; Appendix C p. 120c to Petition).

It is submitted therefore that *all* of Appendix A to the "Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" as contained in pages 399b to 424b, being hearings held on November 7, 1962 (399b) and November 13, 1962, (410b) are superfluous and immaterial.

I.

Local Legislative Body Was Not Required To Provide Petitioner A Full Dress, Trial Type, Hearing On His Application For A Liquor License Transfer.

In its discussion of the question of whether or not Mr. Lewis had been denied due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, the Court of Appeals stated:

"* * * . . . The evidence makes clear that he was given repeated hearings with opportunity to present and argue his own position. The things which made him unacceptable as a transferee — the tax delinquencies and the closing of the Bar — the history of gambling — a generally poor operation under his management — and his relations with his client, highlighted by his lawsuit against her were known to him and to the Commission. Although not set forth in a formal charge, they were the subject of much discussion."

"Lewis contended that a plea of guilty to possession of gambling equipment at '58-60 Ionia Ave.' was not proof that Barnett's Bar located in the building carrying such address, was the site of, or involved in, the 'numbers' enterprise. Except for that, neither at any hearing before the Safety Committee, at any other revocation hearings or at the trial of the case in-

volved did Lewis make substantial contest of the underlying truth of the events detailed herein and which prompted the Commission's disapproval of him as a transferee. Whatever explanations he offered at the trial had already been made to the Safety Committee. He has not told what evidence he would, or might have offered or developed,, if a more formal type of hearing had been held." (102c, 103c, 104c, 105c and 356 Fed. 2nd at 287, 288).

The Court of Appeals held under the circumstances that Mr. Lewis had been afforded due process.

A. *A Holding Not In Conflict With Decisions Of This Court.*

The above holding is consistent with previous decisions of the United States Supreme Court.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. * * *."
>
> *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), at 894, 895.

As stated by Mr. Justice Goldberg in his concurring opinion in *Willner v. Committee on Character,* 373 U.S. 96 (1963), at 107:

> "* * * As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required. It must be remembered that we are dealing, at least in the initial stage of the proceedings, not with a court trial, but with a necessarily much more informal inquiry into the applicant's qualifications for admission to the bar. Circumstances will determine the necessary limits and incidents implicit in the concept

> of a 'fair' hearing, Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded. * * *''

For a discussion of varying types of hearings acceptable under the Due Process Clause of the Fifth and Fourteenth Amendments, see Davis, The Requirement Of A Trial-Type Hearing, 70 Harv. L. Rev. 193.

As expressed by one City Commissioner:

> "We talked about the taxes, I think, at every meeting in which he was in attendance" (76a).

The City Clerk who was called by Mr. Lewis testified that Mr. Lewis had attended several of the sessions of the Safety Committee Hearings; that he was allowed to make statements with reference to his application and that Mr. Lewis was asked questions to which he made answers (60a).

Mr. Barto, Chairman of the Safety Committee, testified that he tried very hard to conduct orderly meetings; that everyone was given "ample opportunity to present their case"; that the matter of taxes was discussed; that Mr. Lewis was recognized and heard repeatedly and allowed to make statements (90a); that he advised Mr. Lewis that Dr. English would be acceptable as a transferee (92a); that there were discussions at Safety Committee meetings

at which Mr. Lewis was present concerning his management of the bar (93a) and that there was discussion concerning gambling activity at the bar while Mr. Lewis was the manager (94a).

Mr. Sevensma (attorney-member of the Commission) remembers how Mr. Lewis accused the Chief of Police of lying at the April meeting (158a); that he had a personal discussion with Mr. Lewis in January or February about the application at which Mr. Sevensma made a request for information (167a).

Commissioner Vanden Berg, then a Professor at the University of Michigan, testified:

> "You told us frequently, Mr. Lewis, that you were the attorney in fact, had power of attorney and you were running the bar. This is what you told us: You hired, you fired, you controlled the till and you were in charge" (207a).

Further, that Mr. Lewis did *not* request reasons prior to July 31st (207a).

In his appearance at Court, Dr. Cortez A. English remembered very well that there was an animated discussion on the part of several commission members at "transfer meeting he attended" (239a, 240a).

As determined by the Court of Appeals, the facts upon which the Safety Committee based its denial of the application in question were either admitted by petitioner or uncontested by him at the hearings provided (104c, 105c). Although the things that made Mr. Lewis unacceptable were never set forth in a formal charge, they were the subject of much discussion at the hearings provided (103c).

The cases relied upon by petitioner to support his claim that a conflict with applicable decisions of this Court exists are readily distinguishable. In *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), petitioner's application to practice before the Board was turned down without any hearing or reasons. The holding of the Court was that petitioner was entitled to be heard in a manner consistent with due process, if he demanded it. Just what would constitute due process under

the circumstances is not set forth in the opinion. It is interesting to note that the Court affirmed the dismissal of the petition for mandamus because petitioner had failed to demand from the Board the right to be heard on the charges against him which provided the basis for denial.

In *Greene v. McElroy,* 360 U.S. 474 (1958), the Court was again faced with the situation where petitioner's rights were infringed on the basis of facts provided by persons whom petitioner was not allowed to confront in cross-examination at the hearings provided.

In *Schware v. Board of Bar Examiners,* 353 U.S. 232, (1957), there was no question of whether or not a proper hearing had been provided. The holding of the Court was that there was no evidence in the record which would justify a finding that petitioner was unfit to practice law.

In *Willner v. Committee on Character and Fitness,* 373 U.S., 96 (1963), the Court held that confrontation and cross-examination were requirements of procedural due process where the Committee is relying upon ex parte statements in denying petitioner's application for admission to the bar. This problem was not before the Court of Appeals in the instant case (102c, 103c, 104c, 105c). Also at issue in *Willner* was the fact that petitioner had requested a statement of the reasons for the refusal to certify him and had been refused. Under these circumstances, the Court held that petitioner was entitled to notice of and a hearing on the grounds for rejection. In the instant case, however, there is no claim made by Mr. Lewis that he requested a formal statement of reasons and was refused. In fact, "the things which made him unacceptable as a transferee — the tax delinquencies and the closing of the bar — the history of gambling — a generally poor operation under his management — and his relations with his client, highlighted by his lawsuit against her — were known to him and to the Commission" (103c). The significance of this fact is brought out by *Goldsmith v. United States Board of Tax Appeals,* 270 U.S. 117 (1926), where the Court said at 123:

> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the

> Board the right to be heard on the charges against him upon which the Board has denied him admission. *But he made no demand of this kind.* Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the Board to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. *Until he had sought a hearing from the Board, and denied it, he could not appeal to the Court for any remedy* and certainly not for mandamus to compel enrollment. * * *" (Emphasis provided.)

The *Goldsmith Case, supra,* makes it clear that until petitioner requests a formal statement of reasons for the denial of the transfer and a hearing to try and explain them, he has no standing in Court to claim a denial of due process based upon *Willner v. Committee on Character and Fitness, supra.* The Court of Appeals was not faced with a demand for, and refusal to give, a formal statement of reasons, as in *Willner, supra,* in deciding that procedural due process had not been denied petitioner in the instant case.

Another important factor to be considered is set forth in *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), at 895:

> "As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of a precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." (Citations omitted).

The decision of the Court of Appeals below takes into consideration "The traditional municipal interests in re-

gulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials'' (102c).

In *Crowley v. Christensen,* 137 U.S. 86 (1890), this Court recognized the potential danger to the community created by a liquor establishment and the consequent compelling reason for vesting the regulatory authority involved with wide latitude and discretion in liquor licensing matters.

B. *Holding Not In Conflict With Another Court Of Appeals.*

Petitioner contends that the decision of the Court of Appeals in this case conflicts with the holdings in *Minkhoff v. Payne,* 210 F. 2d 689 (C.A.-D.C., 1953), and in *Hornsby v. Allen,* 326 F. 2d 605 (1964).

In *Minkhoff, supra,* there was no question raised about the form of the hearings provided. The only question decided was whether or not the findings of the Board was so arbitrary or capricious, or unsupported in the evidence, as to be discriminatory. The decision affirmed a summary judgment in favor of defendant.

In *Hornsby, supra,* plaintiff alleged that her liquor license application was denied without reason and that such denial was arbitrary unreasonable, unjust, capricious and discriminatory. The Trial Court dismissed her complaint. The Court of Appeals held only that the complaint stated a cause of action and that the District Court should take proofs to determine whether due process and equal protection had been afforded by the Board in making its determination. The dicta set forth at page 608 regarding the type of hearing that would satisfy procedural due process was not necessary to the decision made and was rendered without benefit of evidence regarding the procedure actually used and the source of the facts relied upon by the Board in making its determination.

II.

The Provisions Of The Michigan Administrative Code And The Administrative Procedures Act Are Not Applicable To Local Legislative Bodies.

Petitioner contends that the Michigan Administrative Code and Michigan Administrative Procedures Act apply to local legislative bodies acting on liquor license transfer applications. Although it is difficult to understand the petitioner's conclusions from this contention, the matter can be quickly put to rest by observing that the Administrative Code and Administrative Procedures Act, as set forth in Mich. Stat. Ann., Secs. 3.560(7)-3.560(18), and Secs. 3.560(21.1)-3.560(21.10), apply only to "State Agencies" and "Agencies" respectively, as defined by the statutes. According to the Administrative Code, Mich. Stat. Ann., Sec. 3.560(7)(1):

> " 'State agency' includes any officer, department, bureau, division, board, authority, agency, commission, or institution of this state *except the judicial and the legislative branches.*" (Emphasis supplied.)

The Administrative Procedure Act, Mich. Stat. Ann., Sec. 3.560(21.1)(1) provides:

> " 'Agency' means any state board, commission, department, bureau or officer, authorized by law to make rules or to adjudicate contested cases, *except* the Workmen's Compensation Commission, the Employment Security Commission, the Department of Revenue, the Public Service Commission *and those in the legislative and judicial branches.*" (Emphasis supplied.)

It is difficult to see how the legislature could have indicated any more clearly that the Act did not apply to local legislative bodies. This intention is made even more clear by the fact that a provision for a notice and hearing before the local legislative body prior to requesting a revocation of a liquor license was added to the statute in 1960. Mich. Stat. Ann., Sec. 18.988. If, as petitioner

contends, such notice and hearing was already required under the Administrative Code and Administrative Procedure Act, what was the purpose of this amendment;

III.

The Reasons For The Denial Of Petitioner's Application For A Liquor License Transfer Were Not Arbitrary, Capricious Or Unreasonable So As To Deny Petitioner Equal Protection.

Petitioner contends that the reasons stated by the respondents to have been the basis for their disapproval of the transfer were arbitrary, capricious and unreasonable. His petition to this Court contains no authority in support of this contention however.

As stated in *Midwest Beverage Co. v. Gates,* 61 F. Supp. 688 (N.D., Ind., 1945), at 692:

> "* * * The legislature cannot use the police power as a subterfuge to do something that it otherwise could not do in the infringement of private interests or the restraint of private rights. *On the other hand if the legislative act is within the permitted area it has some relation to the health, morals, safety or welfare of the public, it is not for the courts to question the policy or wisdom of the statute.*" (Emphasis supplied).

In *Crowley v. Christensen,* 137 U.S. 86 (1890), the Court states at 91:

> "As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. * * *"

The Michigan legislature has vested the local legislative body with full power and discretion with respect to the approval of liquor license transfers. *Hansen v. Romeo Village Council,* 339 Mich. 612 (1954); *Roodvoets v. Ancer,* 308 Mich. 360 (1944). Accordingly, so long as the reasons relied upon by the respondents for denial of the license are related to the health, morals, safety or welfare of the public, it cannot be said that they are arbitrary, capricious, or unreasonable. This Court made its position clear regarding the extent of judicial review of such matters in *Securities Comm'n. v. Chenery Corp.,* 332 U.S. 194 (1946), where it said at 207:

> "We are unable to say in this case that the commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the commission's conclusion *only if it lacks any rational and statutory foundation...* * * *" (Emphasis provided.)

Considering the wide range of discretion vested in the local legislative body in matters of liquor licensing, it cannot be said that the reasons given for denial of petitioner's transfer application were arbitrary, capricious or unreasonable.

IV.

The Court Of Appeals Was Correct In Holding That The District Judge Had Erred In His Factual Findings Of Discrimination.

Taken from the arena of the emotion that attends hard fought claims and charges and countercharges that are made, the Circuit Court of Appeals properly delineated the facts and made a thorough and searching analysis of the case. Unlike the Trial Judge, the Judges of the Court of Appeals had the benefit of an accurate transcript. More importantly, unlike the Trial Judge, the Court of Appeals had the benefit of weighing *facts* rather than personalities.

A. *The District Judge Erred In Granting A "Temporary Injunction".*

Petitioner Alphonse Lewis commenced his case with an *unsworn* complaint on November 19, 1962 (2a, 6a-10a). Upon the allegations of the *unsworn* complaint, *without* an affidavit or verification of any kind, he obtained a "Temporary Injunction" from the same District Judge who eventually heard the case, all in direct violation of Rule 65(b) of the Federal Rules of Civil Procedure. (12a, "Affirmative Defenses, par. 1 and 2a "Docket Entries"). Not until January 2, 1963, a month and a half *after* filing the complaint and securing a "Temporary Injunction" did petitioner comply with the Rule. (3a: "Docket Entries"). This unique procedure indulged in by the District Judge becomes more significant when it is recognized that Grand Rapids City officials are located within one block from the Federal Court.

B. *The District Judge Erred In Pre-Trial. February 1, 1963.*

On February 1, 1963, the District Judge announced that the "Chief of Police particularly made a strong case against the City" (31a) and resorted to some peculiar "documentation":

> "THE COURT: Well, then there was a series of vigilance and undercover men operating in the area and no proof of violations. This coupled with the attitude of the Chief. . ."

How it was possible for the District Judge to make this determination is most difficult to understand. There was available to the Court all the evidence that subsequently was produced at the trial that proves the utter falsity of the Judge's conclusion.

The raid on Barnett's Bar was precipitated by a tip-off on gambling at that location by a negro police sergeant.. It was reported by the negro police sergeant to the Chief

of Police (234a). The negro police sergeant had *not* been sent into the area by the Chief "or anybody in the police department" (235a). The raid was preceded by a visit to the bar by *one* person, a negro officer brought in from Saginaw, Michigan, who actually saw, observed and *witnessed* gambling being conducted at the bar in which the bartender participated over a period of days. (Ex. No. 71, 291a).

The police sergeant who first reported the activities to the chief has, upon many occasions been on "loan" to other police departments for similar services (238a). Likewise, the practice has extended to establishments operated by white skinned people leading to raids and arrests (221a).

The further statement by the Trial Judge on February 1, 1963, is significant:

> ". . . there is strong evidence that the Chief of Police particularly made a strong case against the City, a very strong case against the City on his own appearance, on his own reaction on the stand; it was very adverse. . ."(31a).

As heretofore related, there is no rule, law, holding or statute that requires the approval of the Chief of Police for the granting of or transfer of a liquor license. The Liquor Control Commission (State) has approved of licenses "over the objection of the Police or the Sheriff Department" (42a, 116a, 176a, 230a). The only approval on the local level required is that of the legislative body (42a). Mr. Lewis sent a letter to the City Clerk on January 11, 1962, and five days later he had secured his first hearing from the Safety Committee of the City Commission, the local legislative body (154a, 245a, 246a). The Chief of Police did not have a vote upon the committee and did not rule or dictate to the committee (97a, 192a, 193a, 196a). Nevertheless, the Trial Judge indicated strongly and clearly many months before the actual trial that the *City* would have a heavy burden to overcome in the case and that the unsworn complaint of plaintiff Lewis was going to be accepted as correct.

Pre-Trial Conference May 8, 1963.

At the Pre-Trial conference of May 8, 1963, the Trial Judge observed:

> "In the hearing, one of the things that came out was that the plaintiff had successfully defended people. On the record, it appeared to be a burr under the saddle of the chief of police.
>
> "Now this is not the chief's of police business, nor any of the city's business . . ." (33a).

Again the Trial Judge displayed a strong emotion toward and against the Police Chief and an apparent misconception of the role of the Chief and that of the Commission.

The facts are that the attitude of the Police Chief is a very understandable one. The Liquor Control Act and Rules and Regulations thereof specifically provide against "gambling or gaming devices or paraphernalia of any nature, type or description . . ." (Exhibit H-3, 273). The statute also provides:

> "(b). No licensee, his agent, or employee shall refuse, fail or neglect to cooperate with any law enforcement officer in the performance of such officer's duties . . ." (Ex. H-3, 272a).

Mr. Lewis was the manager of Barnett's Bar by his own act and deed (21a, 100a). He drew up the management documents (Ex. 8-L-R, 277a). He was in control while gambling was taking place at the bar (Ex. HH, 255a). He then defended all of those arrested (Ex. 71, 288a-292a) and eventually appeared with Wesley Calloway who entered a plea of guilty to illegal activity at the building (Ex. W, 248a).

It is not unreasonable to assume that the Chief might be concerned about recommending a man as licensee who was a manager of a business who had tolerated gambling in violation of the law and then put on his "attorney's" hat and successfully represented the gamblers in Court. At least in the eyes of a *policeman* this would appear to be something less than cooperation. In fact, it might

be reasonable for the City Commissioners to have the same fear that Mr. Lewis as licensee might *not* be an improvement over Mr. Lewis-manager.

For a Trial Judge to say *before trial* that "this is not the Chief's of Police business, nor any of the city's business" (33a) did not put the case in a posture for an objective hearing or decision.

C. *The District Judge Erred In Trial.*

The District Judge repeatedly revealed his basic attitude toward the trial in the following statement:

> ". . . you have only three negro establishments in a city of 200,000. You have an intensity of surveillance of this establishment . . ." (105a).

When the judge advised "settlement" he stated:

> ". . . Now, I think I have made this observation clear, that there is not any question about it, that this license should continue and it should continue as a negro operated licensed establishment" (117a).

The statements of the Court reveal several basic and erroneous generalizations:

(1) That there must be a large negro population in Grand Rapids ("City of 200,000").

(2) That there was an "intensity of surveillance of this establishment".

(3) That whatever violations there might be, the bar was going to remain open, and, if need be in the hands of a violator.

(4) That a bar must be negro owned and operated as a matter of service or right for negroes generally;

(5) That negroes cannot be properly served unless a bar is negro operated and owned.

It is submitted that the Trial Judge at an early hour set an objective in the outcome of the case that eventually led him to rejecting anything that was said under oath by at least nine responsible people and accepting anything that was claimed by Mr. Lewis.

D. *No Racial Discrimination Shown.*

When Mr. Lewis filed his unverified (and unsupported) complaint on November 19, 1962, (upon which he illegally received an injunction from the Trial Court) he made no claim of racially inspired discrimination (6a-10a). It was not until January 2, 1963, some six weeks later as an afterthought that it was added (17a). In the course of the trial Mr. Lewis called several witnesses.

Lewis Witness — Andrew J. Spyk.

Mr. Spyk was an investigator for the Michigan Liquor Control Commission. He had no contact with the City Commission. He had considerable contact with the Chief of Police. His conclusions as to the Chief were:

> "A. He did not discriminate against Mr. Lewis" (44a).

Lewis Witness — Richard Loughrin.

Mr. Loughrin, a former prosecuting attorney, testified concerning the Chief:

> "A. In my opinion he had never displayed any bias toward Mr. Lewis . . . Never any reference to Mr. Lewis as a member of any race" (44a).

Lewis Witness — Dr. Cortez A. English.

Dr. English was a negro (78a). He testified that Mr. Barto (Chairman of the Safety Committee) advised him that ". . . he didn't think I would have any trouble getting it by myself" (239a).

As to the Chief of Police, Dr. English testified that Mr. Lewis ". . . didn't have the right temperament, or something to that effect, to run a bar . . ." (239a).

Lewis Witness — Dred Scott Madison

Dred Scott Madison, a negro, had been a segeant on the police force. He had been demoted by the Chief of Police after a hearing before the Civil Service Board (233a, 234a). As to bias by the Chief, he testified:

> ". . . I couldn't believe he was biased against me himself" (233a).

Independent Witness — Dr. James B. McKee

Dr. James B. McKee, a Professor of Sociology at Michigan State University had prepared a book after extensive investigation in the Grand Rapids area, entitled "Negro Leadership in Grand Rapids", identified as Exhibit QQ (173a). He worked with the Human Relations Commission in Grand Rapids in its preparation (175a). Dr. McKee was a member of the American Civil Liberties Union. When the *defendants* (Counsel for the City) sought to interrogate an *independent* witness on the subject of discrimination among the officials of the City of Grand Rapids and have his findings introduced for consideration the attempt was met by a violent objection by Mr. Lewis and sustained by the Court (176a, 240a).

Independent Witness — Arthur Arens.

Arthur Arens was District Supervisor for the Michigan Liquor Control Commission. He found Lewis to be very uncooperative in his investigation (111a). He testified that he has never, in his frequent conversations with the Chief of Police found any display of animus, bias, or anger toward Mr. Lewis (114a).

The Defendants.

The decision of the Court of Appeals properly sets forth the personal history of each of the Commissioners (356 *Fed. 2nd* at 296 and 119c). Regrettably, as each Commissioner stood his ground in this case, relying on the fact that the City Attorney had advised that no reasons had to be given, the Trial Judge accused them of duplicity. (222 *Fed. Supp.* at 372; 57c). The Judge questioned their integrity (57c). As stated by the Court of Appeals:

> "To sustain a finding that denial of Lewis' application was the product of racial or other discriminatory motive would require us to leave unreversed a holding that commissioner VandenBerg's above recital was but a perjurious mask to hide his real and vicious motives. We cannot do so" (119c).

The best answer to the unfounded charge by the Trial Judge was given by Mr. Lewis himself several months before trial at one of the Trial Judge's "Pre-Trial" conferences:

> "Mr. Lewis: . . . the safety committee approved of Dr. English, the chief of police approved Dr. English. All of the hearings were directed to me personally . . ." (32a).

Mr. Joseph Sypniewski testified:

> ". . . I would like to have this bar stay with the negro people. They are entitled to it and I will do my best to make sure it stays in that race" (251b).

Mr. Jamo approached Mr. Lewis after the action taken by the Commission on July 31st and suggested even then that he get Dr. English to apply and that Dr. English would be acceptable to the City Commission (130a, 131a, 143a).

The conduct of the Commission at the *time of the hearings* clearly demonstrates that they were *not* racists. The facts of the case clearly show that Mr. Lewis has sought to perpetrate a fraud and uses his race to do so.

Race was injected into the case by Mr. Lewis as an afterthought. Mrs. Lamberts discussed City problems frequently with Mr. A. Cowles, Director of Human Relations and a negro (82a). Mr. Jamo had discussions with Mr. Cowles and had been the recipient of a commendation from the local chapter of the N.A.A.C.P. (121a). Mr. Sevensma had actively supported the candidacy of a negro for Municipal Judge against two "white" opponents (166a).

The District Judge decided that Mr. Lewis was going to have his client's license no matter what his past conduct might be. The Trial Judge had the benefit of Mr. Lewis' perjured testimony in the Bankruptcy Court in which Mr. Lewis testified that he had been appointed as a receiver pursuant to Circuit Court proceedings (18a) when, in fact, the Circuit Judge had rejected his callous attempt to wring it from his client (179a). The District Judge was not interested in hearing the truth of Mr. Lewis' active participation in gambling at Barnett's Bar prior to the raid (148a, 241a). The District Judge heard Mrs. Ettress *off the record in chambers.* The District Judge would not hear another witness' account of Mr. Lewis' gambling activities while manager at the Bar (241a). The District Judge advised that it would not receive such evidence because "that was not disclosed to any member of the police department, or to any member of the City Commission . . ." (241a). True, but it was *available* for consideration by the District Judge before he chose to substitute *his* judgment for that of the Commission.

Counsel for the defendants made plain to the Trial Judge repeatedly the significance of such testimony (151a).

What the Trial Judge decided was that if *he* found that the local legislative body had denied due process and equal protection to a person, then that person, no matter how despicable, no matter how unqualified, no matter how unfit, would receive the license (152a, 241a). The Court refused to appraise and assess Mr. Lewis as a licensee because it refused to allow the truth about him to be shown (151a, 152a, 241a).

Fortunately, the Court of Appeals considered the facts devoid of emotion and made objective findings which were supportable.

V.

The Question Of Due Process Has Become Moot As A Result Of The Bankruptcy Of Licensee.

On March 20, 1962, as the result of a lawsuit by petitioner Lewis against his former client, Patricia Ettress entered into an executory contract with Lewis whereby she agreed, among other things, to transfer him her interest in the liquor license in question in return for the release of her indebtedness to Lewis resulting primarily from his manager's fees, attorney's fees and loans (75c). The executory nature of the contract is made clear by the provision that:

> "* * * This agreement shall be subject to the transfer of the license from second party to the first party or his assigns, by the Michigan Liquor Control Commission and that no money shall be paid out in connection with this agreement except as herein provided until the transfer of said license is so approved and transferred to first party."

On September 10, 1962, Patricia Ettress, then Patricia Ettress Bell, filed a voluntary petition in bankruptcy (69c). On October 15, 1962, Mr. Lewis and Dr. English were ordered to show cause why the Trustee in Bankruptcy should not be declared the owner of the license(69c). A hearing was held on November 1, 1962, and the Referee in Bankruptcy entered an order declaring that Trustee was the owner of the license free and clear of any claim of Mr. Lewis or Dr. English (69c, 8a). On November 7, 1962, Mr. Lewis filed a petition for a review of this order and by agreement between the Trustee and Mr. Lewis, the District Judge below undertook to hear this petition along with the rest of the instant case (69c). The District Court affirmed the holding of the Referee in Bankruptcy that the sole owner of the license was the Trustee (69c).

When Patricia Ettress filed bankruptcy on September 10, 1962, the executory contract for the transfer of the license became subject to the provisions of the Bankruptcy

Act. Section 70 (b) of the Act, being 11 U.S.C.A., Section 110(b), provides in part:

> "Within sixty days after the adjudication, the Trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the Court may for cause shown extend or reduce such period of time. *Any such contract or lease not assumed or rejected within such time, whether or not a Trustee has been appointed or has qualified, shall be deemed to be rejected.*" (Emphasis provided.)

There is nothing in the record indicating that the Trustee in Bankruptcy assumed the executory contract in question. On the contrary, the Trustee petitioned the Referee in Bankruptcy for an order declaring that said license was free and clear of any interest of the petitioner, Alphonse Lewis, Jr., and the order was granted. Subsequently, the District Court affirmed this order with the exception that the Trustee's ownership was "still subject to the lawfully pending transfer to Mr. Lewis and Dr. English" (69c, 70c). The District Court overlooks the fact that there was no pending transfer between the Trustee and Mr. Lewis and Dr. English. The executory contract of March 20, 1962, regarding the transfer of the license has been rejected and the Trustee is free to sell the license to whomever he chooses at the best price available. To hold otherwise would force the Trustee to accept a burdensome executory contract at the expense of the other general creditors, contrary to well-established bankruptcy law. *Bank of America National Trust and Savings Ass'n. v. Smith,* 336 F. 2d 528 (C.A.-9, 1964); *Gulf Petroleum, S.A. v. Collazo,* 316 F. 2d 257 (C.A.-1, 1963). Even it the license transfer had been approved on July 31, 1962, the Trustee in Bankruptcy would have been entitled to set aside the transfer as a preference. 11 U.S.C.A., Section 96. The preferential nature of the transfer is clearly indicated by the fact that the major portion of the consideration of said transfer was the release of unsecured claims by Mr. Lewis against Mrs. Ettress. However, because no transfer had taken place prior to the bankruptcy, the Trustee performed

his duty toward all of the creditors by merely rejecting the transfer agreement.

It is undisputed that the Trustee is the present owner of the license. The law is settled that the Trustee may reject a burdensome executory contract. There is no evidence of any valid and existing transfer agreement between Mr. Lewis and the Trustee. Accordingly, respondents contend that even if this Court should find that the hearings leading up to the July 31, 1962, disapproval of the transfer application failed to provide due process, the question has become moot as a result of the bankruptcy of the licensee and the Trustee's rejection of the burdensome executory contract. In short, there is no longer any pending transfer to hold hearings on.

CONCLUSION

WHEREFORE, upon the grounds shown hereinbefore, it is respectfully urged that the Writ of Certiorari be denied.

Respectfully submitted,

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